UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT WILLIAM BARROCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

No. CR-94-0470 EMC

ORDER DENYING PETITIONER'S MOTION TO RECUSE

(Docket No. 898)

I. INTRODUCTION

Petitioner-Defendant Robert Barroca is currently incarcerated for committing various federal drug offenses. Petitioner claims his sentence was enhanced based on a prior 1989 assault conviction. Petitioner sought to obtain relief on his prior assault conviction by filing habeas petitions under 28 U.S.C. § 2255 and 2254. The Court denied both petitions. Currently pending before the Court is Petitioner's Motion to Recuse the undersigned. Petitioner-Defendant's Motion to Recuse ("Motion to Recuse") (Docket No. 898).

II. FACTUAL & PROCEDURAL BACKGROUND

In 1989, Petitioner was convicted of an assault under California Penal Code § 245(a)(2). Petitioner's Motion To Recuse at 9:10-14; Docket 898 at 161. In 1994, Petitioner was indicted for various federal offenses, including felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Motion to Recuse at 9:7-9. Petitioner alleges his prior 1989 state court assault conviction enhanced his sentence for the subsequent federal charges in 1994. *Id*. at 9:14-16.

Petitioner claims that in 2010 he discovered evidence that proves he is innocent of the 1989 assault conviction. *Id*. at 9:17-18. Seeking to obtain relief on his prior assault conviction, Petitioner filed California State Habeas petitions but they were all denied. *Id*. at 9:18-21.

On April 6, 2010 Petitioner filed a motion under 28 U.S.C. § 2255 challenging his federal conviction and sentence as enhanced by the expired state court conviction. Docket No. 782; Motion to Recuse at 4:25-28.

Petitioner also filed a motion to toll the statutory period for his Section 2255 motion. Motion and Request For Statutory and Equitable Tolling Of AEDPA's Statute Of Limitations ("Motion for Tolling") (Docket No. 806). Among other things, Petitioner argued that the Federal Bureau of Prison's ("BOP") new mandatory mailing label system, "TRULINCS," prevented him from writing the court's address on the mailing label. Motion for Tolling at 8:15-23. Petitioner alleged that the label requirement substantially delayed his filing of the Section 2255 motion. *Id*.

In response, the Government argued the label requirement did not hinder Petitioner from filing his Section 2255 motion. United States' Sur-Reply To Defendant's Motion For Statutory And Equitable Tolling ("Sur-Reply Brief") (Docket No. 863) at 3-4:22-6, 4:1-8. The Government presented evidence that Petitioner mailed three pleadings – after TRULINCS was implemented – to an Indiana District Court. *Id*. Petitioner asserted that the Government's evidence was false because the mailing's envelope "did not contain a mailing label." Motion to Recuse 6:27-28; Docket No. 867 at 5-6.

On December 20, 2011, the Court under Judge Ware, denied Petitioner's Motion for Tolling. Docket No. 875. Petitioner claims that, in doing so, the Court relied on the Government's false evidence. Motion to Recuse 6:8-9.

On August 7, 2012, Petitioner filed a Petition For Writ of Habeas Corpus under 28 U.S.C. § 2254 directly challenging his expired state court assault conviction, on grounds of ineffective assistance of counsel, actual innocence, and insufficient evidence. *See Barroca v. Sanders*, C-12-4146 EMC, Docket No. 1. Thus, parallel to this criminal action, a civil case, *Barroca v. Sanders*, C-12-4146 EMC was instituted. The case was assigned to the undersigned.

This Court dismissed the § 2254 petition because it did not fit within the only exception to the rule barring challenges to a prior conviction that was used to enhance a current sentence. *Barroca v. Sanders*, C-12-4146 EMC, Order Of Dismissal (Docket No. 4). Petitioner then filed a motion for relief from the dismissal (Docket No. 8), which this Court also denied. *Barroca v. Sanders*, Order Denying Petitioner's Motion For Relief From Judgment (Docket No. 12).

Petitioner alleges that in denying the motion for relief, "judge Chen specifically instructed Barroca that if Barroca wanted to obtain relief on his actual innocence claim he would have to amend his 2255 motion to include this claim." Motion to Recuse at 6:20-23; *Barroca v. Sanders*, Order Denying Petitioner's Motion For Relief From Judgment at 2:13-15. However, this Court also explained to Petitioner that he had a "high hurdle to overcome" if he sought to amend his petition. Order Denying Petitioner's Motion For Relief From Judgment at 5:7-11.

On December 7, 2012, Petitioner's Section 2255 proceedings were reassigned to the undersigned. Docket No. 883. Thereafter, Petitioner filed a motion for relief from Judge Ware's judgment of December 20, 2011, request for an indicative ruling, and a request to amend his Section 2255 motion. Motion to Recuse 7:4-12; Docket No. 884.

On January 11, 2013, this Court denied Petitioner's motion for relief from the December 20, 2011 judgment. Docket No. 886. The Court found Petitioner could have used the abbreviations "Attn." and "CA" to fit the court's address on the label requirement. *Id*. at 3:15-21. Petitioner argues the Court's finding "amounts to judge Chen making up his own evidence" because the Government did not argue Petitioner could have used these specific abbreviations. Motion to Recuse at 14:11-16. Further, Petitioner alleges the Court ignored evidence that no one explained, nor did BOP's policy state, how to enter the court's address on the mailing label. Motion to Recuse at 18:12-15.

Petitioner filed a motion to reconsider the Court's order denying the motion for relief. Docket No. 889. On March 27, 2013, the Court denied Petitioner's motion to reconsider. Docket No. 890. Petitioner claims that, when the Court denied his motion to reconsider, the Court disregarded the Government's presentation of false material evidence. Motion to Recuse 18:10-12.

Petitioner now moves to recuse the undersigned because this Court allegedly demonstrated extreme favoritism towards the Government by disregarding the Government's presentation of false evidence, and has "personal knowledge of facts." Motion to Recuse at 22:17-24. The Court subsequently granted Petitioner's request to stay the matter and granted extensions of that stay due to circumstances relating to Petitioner's transfer to another housing facility. The stay has now expired.

III. DISCUSSION

Recusal for bias or impartiality is governed by 28 U.S.C. § 455 and § 144. In rare circumstances, the Due Process Clause may also require recusal. *Atterbury v. Foulk*, C 07-6256 MHP (PR), 2009 WL 4723547 at *1 (N.D. Cal. Dec. 9, 2009).

A. Legal Standards

1. Recusal under 28 U.S.C. §§ 144, 455

Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

Section 445 states in relevant part:

> (a) Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

28 U.S.C. § 445.

"The substantive standard for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455 is the same: '[W]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (citation omitted). Generally, recusal based on bias or impartiality requires showing "reliance upon an extrajudicial source" or "favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). In particular, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." *Id.* And, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

"Although the substantive test for bias or prejudice is identical in sections 144 and 455, the procedural requirements of the two sections are different." *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). Section 455 "sets forth no procedural requirements." *Id.* Section 455 "is directed to the judge, rather than the parties, and is self-enforcing on the part of the judge." *Id.* at 867-868. Therefore, "if the judge sitting on a case is aware of grounds for recusal under section 455, that judge has a duty to recuse himself or herself." *Id.* at 868.

Unlike Section 455, "[s]ection 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit." *Id.* at 867. "An affidavit filed pursuant to [] section [144] is not legally sufficient unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party."[1] *Id.* at 868. Furthermore, the affidavit "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. §

[1] *Sibla* required that the bias or prejudice "stem from an extrajudicial source." *Sibla*, 624 F.2d at 868. However, after *Sibla* was decided, the Supreme Court held in *Liteky* that an extrajudicial source "is not a necessary condition for 'bias or prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice." *Liteky*, 510 U.S. at 551, 554.

144. Some courts find that "[a] pro se party cannot supply a certificate of counsel." *Williams v. New York City Hous. Auth.*, 287 F. Supp. 2d 247, 249 (S.D.N.Y. 2003); *see United States v. Bennett*, SACR 03-25 AHS, 2008 WL 2025074, at *2 (C.D. Cal. May 5, 2008) (an *in pro per* plaintiff cannot make the certification of counsel when seeking relief under Section 144); *see also Davis-Rice v. United States*, C 11-3203, 2011 WL 4984062, at *1 (N.D. Cal. Oct. 19, 2011). If the judge to whom the motion is directed finds the motion timely and legally sufficient, "the motion must be referred to another judge for a determination of its merits." *Sibla*, 624 F.2d at 867.

2. Due Process

Due process requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, Inc., 556 U.S. 868, 872 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Circuit courts have found that the federal recusal statutes provide stricter grounds for recusal than the Due Process Clause. *See Davis v. Jones*, 506 F.3d 1325, 1336 (11th Cir. 2007) ("this Court and other circuits uniformly have concluded that the federal recusal statute establishes stricter grounds for disqualification than the Due Process Clause"); *see also United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990); *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) (stating section 455 "reaches farther than the due process clause").

B. Application

The Court first addresses whether there are substantive grounds for recusal under Section 455.

1. Allegation of Bias Due to "favoritism that would make fair judgment impossible"

Petitioner argues that this Court should be recused because its rulings display "extreme favoritism" towards the government "that would make fair judgment impossible." Motion to Recuse at 15. Petitioner specifically points to this Court's order of March 17, 2013 (Docket No. 890), which denied Petitioner's motion for relief from this Court's January 11, 2013 order and motion to amend his 2255 petition to include a claim of actual innocence in his 1989 conviction. In the March 17, 2013 Order, the Court affirmed its finding that the statute of limitations on Petitioner's 2255 habeas

petition had run, that the evidence showed the statute of limitations was not tolled, and consequently, that Petitioner's motion to amend his 2255 habeas petition was moot.

With regard to the evidence pertaining to tolling of the statute of limitations, Petitioner asserts that the undersigned "ignored the government's knowing presentation of false evidence" and disregard Petitioner's evidence that "nobody showed Barroca how to place any address on a TRULINCS mailing label," and "made up his own evidence" by stating that abbreviations "Attn." and "CA" could be used. Motion to Recuse at 13, 15, 18.

First, as explained in the March 17, 2013 Order, the Court did not need to rely on the government's evidence to find that TRULINCS did not prevent Petitioner from timely filing a 2255 petition:

> Petitioner also argues that the January 11, 2013 order was in error because it did not reverse the December 20, 2011 order, despite the fact that he provided evidence that some of the government's representations on the 2011 motion to toll were false or misleading. What this Court found in the January 11, 2013 order, however, was that regardless of any false or misleading evidence provided by the government, there was still sufficient evidence to conclude that this Court's address would have fit on the TRULINCS label, and that Petitioner was thus not prevented from filing his petition by the TRULINCS system. Docket No. 886 at 3.

March 17, 2013 Order (Docket No. 890) at 4. Second, Petitioner's claim that the limitations warrants tolling because no one showed him how to use the computer to place an address on the mailing label is unpersuasive. Petitioner stated that he could type the address on two labels, but could not fit it on one, so the problem was about fitting the court's address on the label rather than any technical problems of using the equipment. Docket 847 (Petitioner's Reply to Government's Opposition to Motion for Tolling) at 14 of 53. As mentioned above, the evidence showed that the court's address fit on the label. In addition, Petitioner was able to send his petition to his sister, who sent it to the court on his behalf. *Id*. Third, the Court did not "make up" the abbreviations "Attn." and "CA" – these were from the address label example provided by the Government. *See* Docket No. 863-1 at 4; 886 at 3. Thus, Petitioner's argument that the Court failed to consider the evidence lacks merit. The Court's ruling is far from "the rarest circumstances [that] evidence the degree of

favoritism or antagonism required . . . when no extrajudicial source is involved." *Liteky v. United States*, 510 U.S. at 555.

With regard to the Court's holding that Petitioner's Section 2255 motion was moot, Petitioner asserts that this Court was able to make it moot, by instructing Petitioner to amend his Section 2255 petition to include the claim. Motion to Recuse at 15-16. The Court addresses this issue more fully in its Order Denying Petitioner's Motion for Relief from Judgment of Court's Order Dated March 27, 2013. In short, the Court recognizes that it erred in holding that the motion to amend was moot on grounds that the statute of limitations expired, but affirms its conclusion denying the motion to amend for other independent reasons. In any case, the Court's initial ruling on Petitioner's motion to amend is not grounds for recusal.

The Court did previously explain that the only exceptions to the non-reviewability of an expired state-court conviction that might apply to Petitioner would be in the context of a 2255 petition challenging a new conviction or sentence that made use of the expired conviction. *Barroca v. Sanders*, Docket No. 12 (Order Denying Petitioner's Motion for Relief from Judgment) at 4. However, the Court explicitly stated that Petitioner had a "high hurdle to overcome" if he sought to amend his petition. *Id*. at 5. A reasonable person would not question the Court's impartiality based on the guidance it provided Petitioner for challenging his 1989 assault conviction.

2. Allegation of "personal knowledge of disputed evidentiary facts"

Petitioner also argues that the undersigned should be recused because he had "personal knowledge of all the disputed evidentiary facts concerning the issues raised in Petitioner's 2254 petition." Mot. to Recuse at 19; *see* 28 U.S.C. § 455(b)(1). However, knowledge of facts from Petitioner's prior § 2254 habeas action does not warrant recusal. *See Liteky v. United States*, 510 U.S. at 55 ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.") (emphasis added). *See also, United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 567 (9th Cir. 1995) (finding that although "Judge Vukasin presided over the criminal

trials [that] does not disqualify him from the civil forfeiture case under § 455"). Thus, this is no substantiating ground for recusal.

C. Legal Sufficiency of the Affidavit Filed Pursuant to Section 144

The Court next determines the legal sufficiency of the affidavit filed pursuant to Section 144.

1. Certificate of Counsel

The Court could find the affidavit legally insufficient under Section 144 because there is an improper Certificate of Counsel. Petitioner is *pro se* and submitted a certificate of counsel that named himself as counsel of the record. Docket 899, Ex. K; *See Jimena v. UBS AG Bank*, CV-F-07-367 OWW/SKO, 2010 WL 2650714, at *3 (E.D. Cal. July 1, 2010) (denying an *in pro per* plaintiff relief pursuant to Section 144 "because his motion [was] not accompanied by a certificate of good faith executed by an attorney a member of the bar of [the] Court").

2. Bias or Prejudice Stemming From an Extrajudicial Source

Petitioner's affidavit is legally insufficient substantively as well. The affidavit does not allege this Court's bias stems from an extrajudicial source, nor does it contain factual allegations that fairly support bias stemming from deep-seated favoritism. Petitioner essentially claims this Court shows "extreme favoritism" in favor of the government based on its judicial actions denying his motion for relief (Docket No. 886) and motion for reconsideration (Docket No. 889). Affidavit Of Robert Barroca ("Affidavit of Barroca"), ¶ 36, Docket No. 899. As noted above, this is insufficient to establish bias. *See Marks v. Askew*, C 11-3851 SBA, 2012 WL 70623, at *3 (N.D. Cal. Jan. 9, 2012) (finding *pro se* Plaintiff's affidavit legally insufficient where "Plaintiff allege[d] bias and prejudice arising out of a judicial action taken by the undersigned; namely, an Order (Dkt.17) denying Plaintiff's request to e-file in this case"); *see also Al-Mansur v. Gross*, C 12-5535 SBA, 2013 WL 3157919, at *3 (N.D. Cal. June 20, 2013) (finding Plaintiff's affidavit was not legally sufficient based on an alleged "bias and prejudice stemming from a judicial action taken by the undersigned; namely, the issuance of an order remanding an unlawful detainer action improperly removed to [the] Court by Plaintiff").

Accordingly, the Court finds that Petitioner cannot proceed under Section 144 because his affidavit is legally insufficient both procedurally and substantively.

3. Due Process

Petitioner argues the undersigned should be recused under the Due Process Clause. The Court denies this motion because the standard for bias recusal under the Due Process Clause is higher than that for Section 455, and Petitioner has failed to meet even the lower standard of Section 455.

IV. CONCLUSION

For the reasons stated above, Petitioner's motion for recusal is **DENIED**.

This order disposes of Docket No. 898.

IT IS SO ORDERED.

Dated: October 31, 2014

EDWARD M. CHEN
United States District Judge